No. 3947

United States
Circuit Court of Appeals
For the Ninth Circuit

J. BILBOA and WILLIAM BORDA,
Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Plaintiffs in Error

Upon Writ of Error to the United States District Court of the District of Nevada.

Huskey & Kuklinski,
Attorneys at Law.
Byington Bldg., Reno, Nevada.

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STATEMENT OF CASE.

On the 26th day of June, 1922 the United States Attorney for the District of Nevada filed an information against J. Bilboa and William Borda charging them jointly with the violation of the National Prohibition Act in three counts; to wit:

First: That on March 20, 1920 they did unlaw-

fully, wilfully and knowingly have in their possession intoxicating liquor.

Second: That they did unlawfully, wilfully and knowingly sell intoxicating liquor.

Third: That they did unlawfully, wilfully and knowingly maintain a common nuisance, by keeping intoxicating liquor for sale in the French Hotel at Gardnerville, Nevada.

Plaintiffs in Error concede the sufficiency of the information on each count.

The offenses charged were alleged to have been committed at Gardnerville, Nevada on March 20, 1922 at the French Hotel. The French Hotel as developed in the evidence was owned by J. Bilboa. It contained a soft drink parlor and bar room, and also furnished meals and rooms. The defendant William Borda was employed by J. Bilboa at the time of the alleged offense, as bartender. Shortly after midnight on March 20, 1922 three prohibition officers, H. P. Brown, A. Carter and P. Dubois entered the French Hotel, one of them H. P. Brown jumped over the bar, seized defendant William Borda and by this impetuous movement spilled the liquids contained in the glasses on the bar. Witness A. Carter and H. P. Brown testify that before the entry of the three into the establishment they, Carter and Brown looked through the window and saw two men in front of the bar, two glasses on the bar filled with some liquid, and saw defendant William Borda behind the bar and directly in front of the two men on the other side of the bar. Brown states that the men were

drinking, Carter states they were about to drink. Both agree that the contents of the glasses which had stood on the bar were spilled. There is no testimony that any dregs even remained in the glasses. They testified that from the odor in the glasses they supposed one glass contained wine, another corn whiskey. They also testified that from the appearance they saw a reddish looking liquid in one of the glasses and a pale dark brown liquid in the other. To be more **specific witness** A. Carter states that when he looked through the window he saw two men standing at the bar, about **ready to take a drink.** Transcript of Record—Page 68.

Witness Brown testifies **that from the window he saw** some money on the bar, a piece of silver. Transcript of Record—Page 95.

Witness A. Carter testifies that after he entered he also saw a piece of money on the bar, but could not tell the denomination, or what became of it.

All three witnesses agree that the liquids spilled were spilled by their precipitous action and that the defendant William Borda made no attempt whatsoever to spill the liquids contained in the glasses, to resist the officers or to destroy the evidence.

Witness Brown testifies that the glasses had an alcoholic smell. Witness Dubois testifies that from the odor one glass appeared to have had wine in it and the other seemed to be whiskey and witness Carter testifies that he determined that there had been red wine and corn whiskey in the glasses looking at them and smelling of them.

The officers then discovered a bottle of wine about one quarter full on the drain board behind the bar and a small half pint flask of corn whiskey one quarter full in an overshoe on the end of the bar. There were three or four pairs of overshoes at the end of the bar and besides the two men alleged to have been drinking or about to drink another man was sitting close to the stove at the end of the bar in the vicinity of the three or four pairs of overshoes.

Defendant J. Bilboa, proprietor, was upstairs in bed where he had retired about eleven o'clock that evening, until ordered to come down by witness Brown. Both defendants acknowledged their mutual relationship, namely that defendant Bilboa was the proprietor and that defendant Borda worked for the proprietor. Both **disclaimed absolutely all knowledge** of the bottle of wine and the half pint flask of whiskey. Defendant Borda testifies that he did not serve either wine or corn whiskey or any intoxicating liquor to the customers but that he did serve **O. T.** and **grape juice.** Both defendants testify they never sold or kept any intoxicating liquors. There is no dispute as to the contents in the bottle found on the drain board nor as to the contents of the half pint flask found in the overshoe.

The Court admitted the half pint flask of whiskey in evidence but specifically instructed the Jury that they could not regard or take into consideration the half pint flask of whiskey so far as defendant Borda was concerned but that it could be considered against defendant Bilboa. Prior to the introduc-

tion of evidence defendants moved for separate trials, which motion was denied by the Court.

The Jury found defendant William Borda guilty of sale, convicted defendant J. Bilboa of possession and sale, and found both defendants not guilty of maintaining a nuisance by keeping liquor for sale.

SPECIFICATIONS OF ERRORS.

The first assignment of Error made is that there is no evidence to support the verdict; that there is no evidence to show guilty knowledge of the defendants as to the alleged liquor found on certain premises.

Second: That the Court ignored the element of knowledge in its instructions.

Third: That the verdict of the Jury is contrary to the evidence.

Fourth: That the verdict of the Jury is contrary to the Law. At the outset of the case a motion for a separate trial of the defendants was denied by the Court.

ARGUMENT.

We respectfully contend that the entire evidence submitted was insufficient to sustain the conviction of these defendants or either of them on any charge. One factor must be borne in mind particularly as to the defendant Borda the bartender, that the half pint of whiskey was excluded from the consideration of the Jury. That as far as defendant Borda is concerned, only evidence relating to the empty glasses and the bottle of wine on the drain board is

to be considered. Defendant Bilboa if responsible at all for any alleged sale that took place is responsible on the theory of express or implied authority granted by him to Borda to sell intoxicating liquors. The rule of Agency in criminal cases has been very recently stated in the case of Nobile vs U. S. 284 Fed. 253—Page 255:

> "Criminal liability of a person or master for the action of his agent or servant does not extend so far as the civil liability. He cannot be held criminally for the acts of his agent, contrary to his order, and without authority, express or implied, merely because it is in the course of his business and within the scope of the agent's employment, though he might be liable civilly."
> Commonwealth vs Stephens 155 Mass. 291, 295.

The evidence in the above case showed that defendant Nobile, the proprietor, actually saw the bartender sell intoxicating liquors, and sent over for liquor to be sold.

No evidence whatsoever appears in the case against defendant Bilboa that he knew anything at all about the **alleged acts of defendant Borda.** There is no dispute that he was in bed and the only link connecting Mr. Bilboa with the sale is the fact that he admitted that Borda was working for him.

In the case of McWhorter vs U. S., 281 Fed. 119 on Page 21, it was specifically held that in a prosecution for crime, the agency of a person whose acts and declarations are offered in evidence against the accused cannot be established by proof of acts and

declarations of the alleged agent, in the absence of proof that accused had knowledge of such acts and declarations and either acquiesced or assented thereto.

> "In a criminal case where no conspiracy has been proven mere suspicion even though that suspicion is based upon the association of the accused with the alleged agent is not sufficient to establish the fact of agency. On the contrary before the declarations of a third person are admitted in evidence against the defendant there must be definite and substantial evidence **direct** or circumstantial to prove the authority of the agent."
>
> And
>
> "Nor does the evidence on the part of the Government tend to show that the acts and declarations of Lawson were all so connected and continued for such a length of time as to justify the inference that the defendant knew and acquiesced therein."
>
> Citing Sievert vs Furniture Company 178 Ill. App. 524.

There is therefore lacking in the Government's case any attempt even to show any knowledge or acquiescence on the part of the defendant Bilboa as to the alleged sale by his servant Borda. No connection outside of the fact that he was the proprietor of the place is shown. The necessary authority either express or implied from Bilboa as to this alleged sale must be proven substantially either by direct evidence or by circumstances sufficient to warrant the inference of authority.

There is no substantial evidence as to the contents of the empty glasses found on the bar. It is certain and obvious that the color alone of the liquor contained in the glasses could not prove beyond a reasonable doubt what the glasses had contained. The attempt to prove what they had contained by the alleged odor of the glasses is indeed a strained one. It is to be noted that witness Brown testified that the odor was an alcoholic one. We submit that even if this were true, it necessarily would not prove that the liquids contained were intoxicating liquors containing more than one-half of one per cent alcohol. The grape juice or the O. T. could have had an alcoholic odor. Witness Carter testified that the glasses smelled of red wine and corn whiskey.

The attempt of the United States Attorney to qualify the officers as experts in order to secure their opinion as to what the glasses had contained did not show that the officers had smelled either red wine or corn whiskey on any other occasion. The testimony we contend as to what the contents of the glasses were is entirely opinion testimony and only a conclusion on the part of the officers.

Certainly the Government did not exclude the hypothesis of innocence.

There was no attempt made upon the part of the Government to connect what the contents of the glasses was supposed to have been with the unlawful liquor found on the premises. No attempt to prove that grape juice or O. T. was not on the premises. No attempt to show that it was not customary to

serve O. T. in a small whiskey glass with a "chaser", same being a hot peppery gingerlike beverage and so served.

That Borda was behind the bar was not an incriminating circumstance. That customers were in front of the bar was not a fact from which guilt could be presumed. In fact, under the presumption of innocence, it is to be presumed that these men had ordered soft drinks, the only drinks a soft drink establishment is lawfully presumed to have. Because of the total failure of the prosecution to connect up the alleged unlawful liquor found on the premises with that alleged to have been sold, there is no substantial evidence of a sale of unlawful liquors. There is nothing to preponderate over the presumption of innocence. The hypotheses of innocence are not excluded at all.

In all the cases examined by us as to the sufficiency of the evidence to sustain a verdict of guilty, we have found none as weak as the case at bar. To prove what the contents of the glasses had been no attempt was made by the Government to prove what the purchasers upon entering the place inquired about or asked for, as in Lewinsohn vs U. S. 278 Fed. 421 and again as in Strada vs U. S. 281 Fed. 143—Page 145. In Cabiale vs U. S. 276 Fed. 771 agents were on the premises as waiters. In Herrine vs U. S. 276 Fed. 806 defendants admitted to officers the sale of unlawful liquors. In Kathriner vs U. S. 276 Fed. 808 defendant made an admission as to the sale. In all of these cases the Government submitted testimony

to exclude any hypothesis of innocence.

No other evidence except that of the half pint flask of whiskey and the bottle about one quarter full of wine was introduced. The Jury specifically acquitted the defendants of the charge of maintaining a nuisance by keeping liquor for sale in the building. In Williams vs U. S. 282 Fed. 483 the Court says:

> "The effect of the Finding of the Jury that the plaintiff in Error was guilty under the second count of the indictment * * * * was in effect an acquittal of the other two offenses charged under that indictment."

If the defendants were not guilty of keeping any liquor for sale in the premises the inference is that they had not sold any unlawful liquors even though unlawful liquor was found there. In the case of Millich vs U. S. 282 Fed. 605 this Court commented upon the fact where the defendants had been acquitted of the sale charge, yet found guilty on the possession charge, that that was entirely possible that though the defendant did not sell the liquor yet they had it in their possession.

In the case at bar we respectfully submit that the Jury found that the defendants had not kept any unlawful liquor on the premises for sale. This fact must be taken as true as well as the necessary inference therefrom and even if the defendants were found guilty of the charge of possession there is no basis for a verdict of guilty on the charge of sale.

There is but one transaction involved in this action and with the slight evidence before it the Jury speculated as to the probable guilt of the defendants. The half pint of whiskey was found in an overshoe at the end of the bar where there were various other rubbers or overshoes. Defendant Bilboa the only one concerned as far as this half pint flask is concerned, testified that the rubber was not his. No attempt was made by the Government to prove that the rubber was Bilboa's or Borda's. No attempt was made to rebut the presumption of innocence or to exclude any hypothesis but that of guilt. Under the circumstances we feel that the entire record is persuasive of a miscarriage of Justice. That the case under no circumstances should have been submitted to the jury by the Court that there was no substantial evidence introduced to outweigh the presumption of innocence and further presumption that no one can presume that men will do wrong. As stated in the late case of Nosowitz vs U. S. 282 Fed. 575—Page 578:

> "Upon this testimony the Jury were permitted to speculate as to intended violation of the statutes on the part of the plaintiff in Error."

AND AGAIN

> "Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial charge to instruct the Jury to return a verdict for the accused, and where the substantial evidence is as consistent

with innocence as with guilt, it is the duty of this Court to reverse a judgment against the plaintiff."

Citing among other cases Isbell vs U. S. 227 Fed. 778.

AND AGAIN in Wiener vs U. S. 282 Fed. 799—Page 801.

"Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial Court to instruct the Jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the Appellate Court to reverse a judgment of conviction."

Citing Union Pacific Coal Company vs U. S. 173 Fed. 737-740 and Wright vs U. S. 227 Fed. 855-857.

Defendants both testified that they had no knowledge that any intoxicating liquor was on the premises. The burden of proof as to how the liquor came on the premises we submit under the construction placed upon the National Prohibition Act in the case of Cleveland vs U. S. 281 Fed. 250 was not upon the defendants. Section 33 of the National Prohibition Act applies only to civil actions concerning the possession of intoxicating liquors. No evidence on the part of the Government was introduced to rebut the presumption of innocence and no evidence was introduced by the Government to exclude the hypothesis of innocence.

All the circumstances shown by the Government

are consistent with innocence, and by a great preponderance. In regard to the sale, which the Government contends was a sale of unlawful liquor, the testimony was entirely opinion testimony. The officers did neither taste nor smell what was spilled on the bar. They took no precaution to secure the best evidence, did not subpoena the purchasers. The Jury speculated on the slim testimony submitted to it. Finding Borda guilty of sale only and Bilboa guilty of sale and possession yet acquitting both of the charge of maintaining a nuisance by keeping liquor for sale in the building can only be explained by the lack of testimony to prove any charge beyond a reasonable doubt. Bilboa could only have been held and convicted of sale on the same theory on which he was charged as codefendant with Borda, namely, that this was a common undertaking, agreed to by both defendants. No evidence whatsoever is introduced as to such undertaking or agreement either express or implied, either directly or by circumstances substantially proving the same. No substantiaal evidence appearing to the contrary we submit the defendants both are entitled to the benefit of the substantial and reasonable doubt caused by the officers' own precipitancy as relates to the alleged sale. Defendant Bilboa is convicted only by the unreasonable and unjust inferences drawn from the entirely lawful circumstance that he was the proprietor of the place. We earnestly contend that had the Court even submitted the case on proper instructions as to burden of proof, as to knowledge, as to opinion

evidence and as to criminal responsibility of master and servant charged as codefendants, an acquittal would have followed. As it was, defendants were entitled to have the verdict set aside. All these matters were matters vital to the defendants' cause. Lack of sufficient evidence of the Government and proper instructions of the Court as manifested by the record resulted in a miscarriage of Justice. If the defendants are guilty they should be proven so by substantial evidence. In the case of Chicco vs U. S. 284 Fed. 435 on Page 438 the Court in a case very similar to the one at bar expresses its views as follows:

> "Indeed we may go further and say that we think there was no **real substantive** evidence on which the case of Chicco should properly have been submitted to the Jury or if submitted to the Jury on proper instructions as to the burden of proof imposed upon the Government in criminal cases, and the presumption of innocence in the accused, no other result could or ought to have followed than a verdict of acquittal. We feel therefore constrained to conclude that the motion for a directed verdict as to Chicco should have been granted or that in any event, on the verdict as returned, the Court should of its own motion have set it aside and granted a new trial."

We therefore respectfully submit that the defendants are entitled to a reversal and new trial.

Respectfully submitted,

HUSKEY & KUKLINSKI,

Attorneys for Plaintiffs in Error.